Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-682 OF 1998
KAMALANATHAN RATNAM J
10 JUNE 1999

Civil Procedure *— Striking out — Counterclaim — Discrepancy between order and written judgment — Counterclaim not considered dismissed but considered in written judgment — Whether court was estopped from considering counterclaim*

This was an application by plaintiffs to strike out the defendants' counterclaim. The plaintiffs had obtained summary judgment against the defendants on 2 September 1998. At that time, the defendants had filed their defence and counterclaim against the plaintiffs. The court however did not grant the plaintiffs' prayer (d) which was for a declaration that the plaintiffs were not liable to the defendants. The file was subsequently transferred to the Civil Division of the Kuala Lumpur High Court. The plaintiffs argued that the court was estopped from considering the counterclaim as the learned judge who heard the application for summary judgment had considered, in his written judgment, that the counterclaim was without any basis or merits.

Held, dismissing the application:

Since the learned judge had made no order regarding prayer (d) or the counterclaim on 2 September 1998, whatever was said by the learned judge in his written judgment in respect of the counterclaim was obiter dicta because the issue of the counterclaim was not res integra. When the learned judge made his decision, there was no question of issue estoppel in respect of the counterclaim because he made no reference to the same either in prayer (d) or to the counterclaim proper. Further, if the matter was clear cut and if there was no counterclaim at all, the learned judge would have at least recorded this in his notes of evidence or made such an order. Further, even before the order was perfected, solicitors for the plaintiffs did not apply to amend the order if at all there had been a mistake as was now contended by the plaintiffs. The very fact that there was this discrepancy between the order and the written judgment raises a triable issue. Therefore, the defendants' counterclaim must go to trial (see p 98B–F); *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 followed.

[Bahasa Malaysia summary

Ini adalah suatu permohonan oleh plaintif-plaintif untuk membatalkan tuntutan balas defendan-defendan. Plaintif-plaintif telah memperolehi penghakiman terus terhadap defendan-defendan pada 2 September 1998. Pada masa itu, defendan-defendan telah memfailkan pembelaan dan tuntutan balas terhadap plaintif-plaintif. Mahkamah sebaliknya tidak membenarkan permohonan (d) yang

dipohon oleh plaintif-plaintif untuk suatu deklarasi bahawa plaintif-plaintif tidak bertanggungan kepada defendan-defendan. Kemudian fail tersebut dipindahkan ke Bahagian Sivil di Mahkamah Tinggi Kuala Lumpur. Plaintif-plaintif berhujah bahawa mahkamah adalah diestop daripada mempertimbangkan tuntutan balas oleh kerana hakim yang arif yang mendengar permohonan tersebut telah mempertimbangkannya di dalam penghakiman bertulisnya, bahawa tuntutan balas adalah tanpa dasar atau merit.

Diputuskan, menolak permohonan tersebut:

Oleh kerana hakim yang arif tidak membuat sebarang perintah berkenaan dengan permohonan (d) atau tuntutan balas pada 2 September 1998, apa-apa yang dikatakan oleh hakim di dalam penghakiman bertulisnya berkenaan dengan tuntutan balas adalah obiter dicta kerana isu tuntutan balas bukanlah res integra. Apabila hakim yang arif membuat keputusannya, tiada terdapat isu mengenai estopel berkenaan dengan tuntutan balas oleh kerana beliau tidak merujuk kepada perkara tersebut di dalam permohonan (d) atau kepada tuntutan balas tersebut. Selanjutnya, jikalau perkara tersebut adalah jelas dan tiada terdapat tuntutan balas langsung, hakim yang arif sekurang-kurangnya patut mencatatkankannya di dalam nota-nota keterangan atau membuat perintah berikut. Selanjutnya, sebelum perintah tersebut disempurnakan, peguam-peguam untuk plaintif-plaintif tidak memohon utnuk meminda perintah tersebut jikalau terdapat sebarang kesilapan seperti yang ditegaskan oleh plaintif-plaintif sekarang. Maka, fakta bahawa terdapat percanggahan antara perintah dan juga penghakiman bertulis membangkitkan isu-isu yang boleh dibicarakan. Oleh kerana itu, tuntutan balas defendan-defendan harus dibicarakan (lihat ms 98B–F); *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 diikut.]

Notes

For cases on striking out, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4335–4344.

Cases referred to

Prestasia Sdn Bhd v Mow Wai Lan [1997] 2 MLJ 236 (folld)

Legislation referred to

Rules of the High Court 1980 O 14, O 28 rr 4(2), 7(3)

Yusuf Khan bin Ghows Khan (*Lee Chan Leong* with him) (*Chan Leong & Co*) for the plaintiff.

Joseph Yeo (*Joseph Yeo*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

I do not intend to narrate the facts leading to the filing of this application. All relevant facts have been stated in my judgment dated 4 January 1999 (see [1999] 2 MLJ 425) dismissing the plaintiff's application (encl 15) for an injunction to restrain the first defendant from dealing with the landed properties presently registered in the name of the first defendant and in the Standard Chartered Bank account. A similar order was made in respect of the second and third defendants. The plaintiffs also applied for an order for disclosure of the full value of the assets of the defendants within the jurisdiction of this court to be verified by an affidavit.

The O 14 application

The plaintiff filed an O 14 of the Rules of the High Court 1980 ('the RHC') application with the following prayers:

(a) An order directing the first defendant to within seven days from the date of the order to return to the plaintiffs the duly executed three sets of the sale and purchase agreement together with a set of Borang 14A and six sets of Borang PDS 15 forwarded by the plaintiffs through their letter dated 8 June 1998 as well as the 10% deposit of RM280,000;

(b) An order directing the first defendant to pay the balance purchase price of RM2,520,000 in accordance with the said sale and purchase agreement and specifically to perform in accordance with all the other terms of the said sale and purchase agreement;

(c) A declaration that the defendants are liable to and that they do pay to the plaintiffs their claim against the defendants pursuant to the settlement agreement amounting to RM18,308,435.54 within seven days from the date of the order;

(d) A declaration that the plaintiffs are not liable to the defendants for any sum of money under the settlement agreement by reason of the failure of the defendants to support their claim with proper documents;

(e) A declaration that the defendants are liable to and that they do pay to the plaintiffs the sum of RM13,100,496 in lieu of the plaintiffs' entitlement of 35% in all the properties of the defendants or alternatively that all the properties of the defendants be distributed after a valuation exercise to be carried out by an independent valuer with cost thereof to be shared by the defendants and the plaintiffs in the proportion of 65% to 35%;

(f) Upon such order of distribution being made, the respective defendants do forthwith effect the memorandum of transfer of the relevant properties in favour of the first plaintiff, failing which the Registrar of the court shall effect the same;

(g) An order directing the defendants to within seven days from the date of the order to provide the details and particulars of and/or account for

A the cash in hand as at 25 October 1995, inclusive of the sum of HK$4,977,252.54 in Hong Kong owned by the defendants, together with the necessary supporting documents to the plaintiffs and at the same time to pay to the plaintiffs 35% of the total sum thereby ascertained less the agreed deduction;

B (h) Interest at the rate of 8% per annum calculated from the date of filing of this action until the date of full realisation thereof on whatever sum or sums ordered to be payable by the defendants or any one of them; and

(i) Costs of this action.

C Having heard arguments the learned judge made no order with regard to prayer (d), but gave an order in terms of all the other prayers.

At the time he made this order on 2 September 1998 the defendants had already filed their defence and counterclaim. This was done on 16 July 1998. Having done so, the defendants then applied on 29 July 1998 (encl 7) to transfer this suit to the High Court at Kuala Lumpur and at the same D time applied for a stay of the hearing of the O 14 application (encl 4). In the meantime the plaintiffs also filed encl 15 for an injunction which I had heard and dismissed.

Although both encl 4 and encl 7 were fixed for hearing on 2 September 1998 the learned judge heard encl 4. With respect to encl 7 which was the E application to transfer and stay the O 14 application he made no order, in that he neither heard it nor dealt with it nor adjourned it. He merely adjourned the hearing of encl 15 to 28 September 1998.

Court's findings

F Whilst there was a specific prayer in the O 14 application (prayer (d)) seeking a declaration that the plaintiffs owe nothing to the defendants and whilst there was by then a counterclaim filed by the defendants, the learned judge in making no order in respect of prayer (d) or by not stating in the order that he had considered the counterclaim and thus was dismissing it, was in my view making obiter dicta statements when in his written judgment G he considered the counterclaim. However, in their submission the plaintiffs argue that the learned judge was correct in examining the counterclaim in his judgment and in finding that it was without any basis or merits and that it was not bona fide. The plaintiffs therefore submit that 'by implication, the effect of the finding by the learned judge is that the defendants' counterclaim is not valid, being contrary to the terms of the settlement H agreement'. On this basis the plaintiffs now raise issue estoppel and allege that this court may not 'willy-nilly ignore the finding on the said issues in reference to the defendants' counterclaim'.

In my view such a submission ignores the relevant decision of the Court of Appeal in *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 where in I a similar situation the court held that the trial judge could have given directions under O 28 r 4(2) or r 7(3) of the RHC for the disposal of the counterclaim and yet he did not do so. Since the order was totally silent as to the counterclaim, it followed that the trial judge did not make any order

under r 7(3) 'that the counterclaim be struck out' which was what he was obliged to do if both parties had argued the merits of the matter and the judge considered it to be without merit. In the result, the counterclaim was left unresolved. The court then went on to hold that the plea of res judicta was without merit.

With regard to the case before me, since the learned judge had made no order regarding prayer (d) or the counterclaim, on 2 September 1998, it is my judgment that whatever was said by the learned judge in his written judgment in respect of the counterclaim is obiter dicta because the issue of the counterclaim was not res integra. Further if the matter was clear cut and if there was no counterclaim at all, the learned judge would have at least recorded this in his notes of evidence or made such an order. Besides even before the order was perfected solicitors for the plaintiffs did not apply to amend the order if at all there had been a mistake as is now contended by the plaintiffs.

The very fact that there is this discrepancy between the order and the written judgment, itself in my view raises a triable issue.

Whilst the plaintiffs concede that neither res judicata nor estoppel per rem judicatem or cause of action estoppel arise in respect of the defendants' counterclaim, they maintain that issue estoppel arises in defence to those issues adverted to on account of the learned judge's finding in the written judgment that the counterclaim is without any basis or merits. Again I must rest my judgment on the basis that on 2 September 1998 when the learned judge made his decision there was no question of issue estoppel in respect of the counterclaim because he made no reference to the same either in prayer (d) or to the counterclaim proper.

There is therefore no need for me to consider in detail and analyse the defendants' counterclaim as has been done by the parties. Suffice it to say that having read the copious submissions of both parties I am satisfied that the defendants' counterclaim must go for trial. After all if the defendants are unable to support their claim with documentary evidence, the plaintiffs can still have their day in court; but then, so can the defendants. This appeal stands dismissed with costs.

Application dismissed.

Reported by Chin En Tek